Supreme Court, U.S.
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No. 06-1111

IN THE

Supreme Court of the United States

PETER BROOKS, DAVID T. GIES, PATRICIA CLEMMER PETERS, ROBIN B. HEATWOLE, DRY COMAL CREEK VINEYARDS, HOOD RIVER VINEYARDS, AND SCHNEIDER LIQUOR COMPANY, INC.,
Petitioners,

v.

ESTHER H. VASSAR, Chairman, Virginia Alcoholic Beverage Control Board; PAMELA O'BERRY EVANS, Commissioner, Virginia Alcoholic Beverage Control Board; SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Board; AND VIRGINIA WINE WHOLESALERS ASS'N, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied *Granholm* v. *Heald*, 544 U.S. 460 (2005), in holding that a narrow exception to Virginia's law restricting the importation of alcohol, which allows individuals to import and transport for personal use small quantities of alcohol, does not violate the dormant Commerce Clause.

2. Whether the court of appeals correctly held that under the dormant Commerce Clause Virginia may authorize its state-owned retail liquor stores, which have a monopoly on the sale of liquor in the Commonwealth, to sell only wines produced in Virginia.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Virginia Wine Wholesalers Association, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of Virginia Wine Wholesalers Association, Inc.

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The Petition ("Pet.") is nothing more than a classic request for error correction that meets none of the criteria governing review by this Court. No conflict among the circuit courts is alleged on the questions presented by Petitioners, and no conflict exists. Sup. Ct. R. 10(a). This case presents no "important question" of federal law, *id.* 10(c), and instead merely involves the application of settled dormant Commerce Clause principles to specific provisions of a single jurisdiction's legislative scheme. *See id.* 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Petitioners' suggestion that this Court should revisit or clarify its decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), is wholly unwarranted and premature: that decision is not yet two years old, the state legislatures are in the process of restructuring their laws in light of that decision, and no conflict on any issue has yet emerged among the circuit courts. In sum, certiorari should be denied.

STATEMENT OF THE CASE

A. Statutory Background

Virginia's scheme for regulating the sale and distribution of alcohol within the Commonwealth, the Alcoholic Beverage Control ("ABC") Act, is a hybrid of the two predominant schemes used by other jurisdictions. For wine and beer, Virginia employs a "three-tier system" of licensed producers, wholesalers, and retailers. Va. Code Ann. §§ 4.1-207, -208, -215, -216. Under this system, producers of beer and wine may sell in Virginia only to Virginia-licensed wholesalers, who in turn may sell only to Virginia-licensed retailers, who may then sell to consumers. Accordingly, wine and beer sold in Virginia generally must pass through its three-tier system. The principal exception, not at issue here, is that Virginia permits both in-state and out-of-state producers and retailers to make limited direct shipments of wine and beer to

individuals for personal consumption (not more than two cases of wine or beer per month). *Id.* § 4.1-112.1.

For liquor, Virginia employs a "control" system in which the Commonwealth has a virtual monopoly. Virginia distillers can only sell and deliver their liquor products within the Commonwealth to the Alcoholic Beverage Control Board ("ABC Board"). *Id.* § 4.1-206(1). The ABC Board, in turn, sells liquor to the public through state-owned liquor stores ("ABC stores"). *Id.* § 4.1-119. The ABC stores also are authorized to sell wine produced by "farm wineries." *Id.* §§ 4.1-119(A), -100. "Farm wineries" are defined as wineries located in Virginia which produce wine from Virginia grapes. *Id.* §§ 4.1-207(5), -219.

The provision in the ABC Act governing the importation of liquor, wine, and beer is designed to maintain and preserve Virginia's "three-tier" and "control" systems, *i.e.*, to make sure that alcohol that enters Virginia properly passes through those systems. Accordingly, liquor imports generally must go to the ABC Board or licensed distilleries, *id.* § 4.1-310(A), and wine imports generally must go to licensed wine wholesalers (except for the limited direct shipments that are authorized to consumers), *id.* § 4.1-310(B). There are also a few exceptions to the import restrictions that involve limited quantities of alcohol and that address situations that have little impact on Virginia's general distribution schemes. Specifically, the import restrictions do not prohibit: (1) "any person from bringing, in his personal possession, or through United States Customs in his accompanying baggage, into the Commonwealth not for resale, alcoholic beverages in an amount not to exceed one gallon," *id.* § 4.1-310(E)(i)[1]; (2) "the shipment or transportation into the Commonwealth of a

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[1] The Petition repeatedly describes this exception as applying to Virginia *residents*. *See, e.g.*, Pet. i (Question Presented No. 1); *id.* at 3. The exception, by its terms, applies to "any person" bringing alcohol into the Commonwealth.

reasonable quantity of alcoholic beverages not for resale in the personal or household effects of a person relocating his place of residence to the Commonwealth," *id.* § 4.1-310(E)(ii); and (3) "the possession or storage of alcoholic beverages on passenger boats, dining cars, buffet cars and club cars . . . or common carriers engaged in interstate or foreign commerce," *id.* § 4.1-310(E)(iii).

This case involves challenges to the statutory provision allowing ABC stores to sell Virginia wines (the "ABC stores provision") and the exception to the import restrictions allowing individuals to import for personal consumption up to one gallon of liquor, wine or beer (the "personal import exception").

B. Procedural Background

This litigation began in 1999, when a different group of plaintiffs challenged several provisions of Virginia's ABC Act under the dormant Commerce Clause. The district court granted summary judgment to the plaintiffs. *Bolick* v. *Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002). Virginia appealed that ruling, but the Virginia legislature amended some of the contested statutory provisions while the appeal was pending, and the Fourth Circuit remanded the case. *Bolick* v. *Danielson*, 330 F.3d 274 (4th Cir. 2003) (per curiam).

On remand, a new group of plaintiffs was substituted and filed a second amended complaint, challenging under the dormant Commerce Clause the personal import exception, the ABC stores provision, and other provisions of the revised ABC Act that are not at issue here. In a decision issued prior to this Court's decision in *Granholm* v. *Heald*, 544 U.S. 460 (2005), the district court held that the personal import exception and the ABC stores provision violate the dormant Commerce Clause. *See* Pet. App. 52a-54a; *see also id.* at 88a-91a (Report and Recommendation of the Magistrate Judge). It also struck down several provisions of the revised

ABC [illegible] but rejected the challenge to the two-case limit in the di[illegible] shipping provision that allows in-state and out-of-state producers and retailers to ship wine and beer to Virginia consumers for personal consumption. *Id.* at 53a; *id.* at 89a-90a.

Virginia again appealed and Petitioners cross-appealed the remedies that the district court ordered with respect to the statutory provisions that are not at issue here. While the appeal was pending, the Virginia legislature again amended the ABC Act, effectively implementing the district court's judgment with respect to the provisions that are not at issue here. It did not amend either the personal import exception or the ABC stores provision.

In the decision below, the Fourth Circuit first determined that the appeal and cross-appeal were moot with respect to the provisions amended by the Virginia legislature. Pet. App. 10a-12a. It then held that the personal import exception does not violate the dormant Commerce Clause, reversing the ruling of the district court. The court of appeals[2] concluded that the legislative amendments also mooted Petitioners' principal argument on appeal for invalidating the exception:

> the core of plaintiffs' challenge to the Personal Import Exception – which was based on the fact that Virginia wineries could sell unlimited amounts of wine directly to consumers, while out-of-state wineries could only sell one gallon or four liters to consumers for personal import – has been rendered moot by Virginia's recent statutory enactments.

Id. at 18a. Indeed, the court of appeals determined that as a result of the legislative amendments, the effect of the personal

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[2] Judge Traxler concurred in the court of appeals' judgment in all respects, including its judgment upholding the personal import exception, but he did not concur in all of Judge Niemeyer's analysis of the personal import exception. Pet. App. 34a.

import exception is to *favor*, not *discriminate against*, out-of-state wineries. As the court explained, the personal import restriction "favors the out-of-state wineries insofar as one gallon or four liters of wine may be imported into Virginia outside of the three-tier structure, whereas in-state wineries can sell only through the three-tier structure or from their own retail premises . . .." *Id.* at 19a.

Because the court of appeals concluded that the legislative amendments mooted Petitioners' core claim that the personal import exception discriminates against out-of-state wine *producers* – and, indeed, made the opposite true – it concluded that the only argument remaining to Petitioners was "that in-state *retailers* are favored over out-of-state *retailers*." Pet. App. 18a. The court of appeals rejected this argument as not only inconsistent with, but foreclosed by, this Court's decision in *Granholm*:

> [A]n argument that compares the status of an in-state retailer with an out-of-state retailer – or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart – is nothing different than an argument challenging the three-tier system itself. . . . [T]his argument is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in *Granholm*, which upheld the three-tier system as 'unquestionably legitimate.'

Id. After rejecting Petitioners' arguments, the court of appeals concluded that the personal import exception does not violate the dormant Commerce Clause because it "provides a *de minimis* exception to Virginia's import regulations" that "[u]nder no economic construct could . . . be considered economic protectionism of local industry." *Id.* at 23a.

The court of appeals also held that the ABC stores provision does not violate the dormant Commerce Clause because Virginia's decision to sell Virginia wines in its state-run liquor stores "is protected under the 'market participant'

exception to the dormant Commerce Clause." Pet. App. 23a-24a. It first rejected the district court's conclusion that the "market participant" exception was unavailable to Virginia because of its dual role as regulator and participant in the alcohol market, explaining that that conclusion was based on a "misread[ing]" of this Court's precedent. *Id.* at 27a. The court of appeals also observed that state regulation of markets "is pervasive" and that "[i]f the mere fact of regulation precluded applying the market participant exception, no State would ever qualify." *Id.* at 28a.

The court of appeals then concluded that Virginia's provision falls squarely within the "market participant" exception because Virginia is doing nothing more than making a product choice that any wine retailer in the Commonwealth would be free to make:

> Virginia's choice of selling only Virginia wine is no more inappropriate than would be its choice to sell only Hershey's brand chocolate bars at a State commissary. Like all other in-state wine retailers, the ABC stores can choose which wines they purchase and stock, and Virginia's commitment to purchase only in-state wines is a choice that any wine retailer would be free to make for itself.

Pet. App. 26a-27a. The court of appeals also soundly rejected the notion that Virginia's choice posed any impediment to the sale of out-of-state wine in Virginia, noting that the Virginia wine market consists of "thousands – more than 10,000, according to Virginia – of other private wine retailers who sell both Virginia wines and out-of-state wines in Virginia." *Id.* at 26a.

Finally, with respect to the dissent's theory that the relevant market is the market for combined purchases of liquor and wine, the court of appeals noted that there was "no evidence in the record to support the dissent's single market theory in an economic sense." Pet. App. 31a. In particular, the court of

appeals found a "lack of evidence" to support the notion that Virginia consumers who want to purchase both liquor and wine are deterred from purchasing out-of-state wine because of the inconvenience of having to go to a second store. *Id.* at 30a; *id.* ("there is no evidence in the record to support any claim of consumer deterrence").

Judge Goodwin concurred in the portion of the majority opinion addressing mootness, but dissented from the portions holding that the personal import exception and the ABC stores exception are constitutional. Pet. App. 34a-39a.

REASONS FOR DENYING THE PETITION

I. THIS CASE IMPLICATES NO CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS THIS COURT'S REVIEW.

The Petition makes no effort to allege a conflict in authority among the circuit courts, and no such conflicts exists. Sup. Ct. R. 10(a). Accordingly, there is no disagreement or lack of uniformity among the circuit courts that warrants this Court's attention.

II. THIS CASE DOES NOT PRESENT ANY "IMPORTANT QUESTION" THAT WARRANTS THIS COURT'S REVIEW.

Petitioners repeatedly assert that the issues presented by this case are matters of "[g]eneral [i]mportance,"[3] but nothing in the Petition supports that assertion. To the contrary, the bulk of the Petition consists of merits analysis that attempts to establish that the court of appeals erred in applying settled dormant Commerce Clause principles to two particular provisions in Virginia's multi-faceted statutory scheme.

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[3] Pet. 20; *see also id.* ("the personal use limit involves a question of substantial importance"); *id.* at 28 (the ABC stores provision "[r]aises [i]ssues [o]f [g]eneral [i]mportance").

Petitioners attempt to elevate the single-jurisdiction issues presented by this case into matters of national importance by asserting that other jurisdictions have similar laws. *See* Pet. 20 ("[a]t least thirty-three other states and the District of Columbia" have personal use limits similar to Virginia's); *id.* at 30 ("[m]any states have state-run liquor stores"). But the unsurprising fact that many other States have chosen not to apply aspects of their liquor codes to personal uses of alcohol – in provisions that Petitioners concede are long-standing, *id.* at 20 – does not mean that there is any recurring legal issue with respect to such provisions. The Petition does not allege that there is any pending litigation concerning such provisions, much less that courts actually have reached conflicting results. Moreover, even though other States have state-run liquor stores, the Petition does not allege that there is any State with a scheme that parallels Virginia's scheme (state monopoly on liquor, with a law authorizing state-run liquor stores to sell locally-produced wine), much less that there is or has been any litigation in any jurisdiction challenging similar privileges of state-run liquor stores under the dormant Commerce Clause.

Petitioners also suggest that this Court's decision in *Granholm* has generated confusion and misapplication that this Court should address.[4] This suggestion is wholly unwarranted and premature: *Granholm* was decided less than two years ago; only a few cases filed in the district courts in the wake of *Granholm* have yet gone to judgment (much less completed their journey through the courts of appeals); and no conflict on any issue has yet emerged among the circuit courts. There simply is no need for this Court to revisit the issues it addressed in *Granholm* at this time.

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[4] *See, e.g.*, Pet. 9 (the court of appeals' conclusion "guts the holding of *Granholm* and creates confusion in an important area of law that *Granholm* sought to clarify").

Moreover, as Petitioners acknowledge, many state legislatures not surprisingly are reforming or have reformed their laws to conform to the Court's ruling in *Granholm*. Pet. 21-22. While Petitioners claim that this ongoing legislative reform makes "[i]mmediate review" by this Court "particularly important," *id.* at 21, the opposite is true. The state legislatures are appropriately revisiting their laws in light of this Court's recent ruling and analysis in *Granholm*. In this case, as in others, the resulting reforms have *mooted* or resolved constitutional challenges that were brought either before or soon after *Granholm* was issued. As the process of legislative reform continues, there is no reason for this Court to intervene in the absence of a conflict that develops in the circuit courts with respect to a particular issue.

Petitioners also urge the Court to revisit the "market participant" doctrine in order to address "confusion" that they assert has arisen in connection with that doctrine. *Id.* at 9, 28-30. The decisions they cite to support this suggestion are not recent, however, which casts doubt on the notion that there is any current confusion in the lower courts. In any event, even if there was long-standing confusion surrounding the "market participant" exception, this case would not be a suitable vehicle for resolving that confusion because the court of appeals' fact-bound ruling in this case does not conflict with the ruling of any other court and was plainly correct.[5]

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[5] The fact that this Court affirmed a Ninth Circuit ruling on a "market participant" issue by an equally divided court in 1985 hardly provides a compelling reason for the Court to revisit the "market participant" doctrine today. *See* Pet. 29-30 (citing *Western Oil & Gas Ass'n* v. *Cory*, 471 U.S. 81 (1985)). In any event, Petitioners' assertion (*id.* at 30) that the public lands issue in *Western Oil* bears "some similarity" to the wine retailing issue presented here is only true at the highest level of generality and does not provide a basis for revisiting a legal doctrine that is highly fact-specific in its application in this case.

III. THE DECISION BELOW IS CORRECT ON THE MERITS.

Although an error by the court below in applying settled dormant Commerce Clause principles would not warrant this Court's review in any event, there was no such error here. The court of appeals' resolution of the two issues presented was manifestly correct.

A. The Personal Import Exception Does Not Violate The Dormant Commerce Clause.

The court of appeals' conclusion that the personal import exception is nothing more than "a *de minimis* exception" to Virginia's alcohol import restrictions that "[u]nder no economic construct could . . . be considered economic protectionism," Pet. App. 23a, is sound and fully comports with this Court's dormant Commerce Clause jurisprudence.

Petitioners do not dispute the court of appeals' conclusion that their core claim that the exception discriminates against out-of-state wineries was mooted by Virginia's legislative amendments. Petitioners are no longer making that claim. They also do not dispute the court of appeals' conclusion that, with the amendments in place, the effect of the personal import exception is to *favor*, not *discriminate against*, out-of-state wineries, other than cryptically to describe the disadvantage to in-state wineries as "theoretical" and to assert that the disadvantage "pales in comparison" to the "far greater benefits afforded local Virginia retailers" – a comparison that is both flawed (as demonstrated below) and wholly unsupported. *See* Pet. 12. These concessions are fatal to Petitioners' challenge to the personal import exception. A statutory provision that poses no disadvantage to out-of-state wineries and, in fact, facilitates their sales to Virginia consumers, as the personal import exception does, presents no dormant Commerce Clause issue under *Granholm* or any of this Court's other decisions. That should be the end of the matter.

Nevertheless, after the legislative amendments foreclosed any argument that out-of-state *wineries* are disadvantaged by the personal import exception, Petitioners switched theories and claimed (as they do in the Petition) that the exception impermissibly discriminates against out-of-state *retailers*. The court of appeals, however, properly recognized this argument for what it is: a frontal assault on "the three-tier system itself" and the import restrictions that preserve that system. *See* Pet. App. 18a. Petitioners' claim that *Granholm* requires equal market access for out-of-state retailers of alcohol and in-state retailers of alcohol is fundamentally flawed. As an initial matter, no issue of discrimination against out-of-state retailers was presented in *Granholm*, and the Court therefore did not address any such issue. Throughout its opinion, the Court focused solely on discrimination against out-of-state wineries and their products.[6]

Moreover, the court of appeals was quite correct to conclude that Petitioners' argument is "nothing different than an argument challenging the three-tier system itself," and is therefore "foreclosed" by this Court's unequivocal reaffirmation in *Granholm* of its prior conclusion that the three-tier system is "'unquestionably legitimate.'" Pet. App. 18a.[7] This Court's express endorsement of three-tier systems is significant because there can be no question that these systems do not accord out-of-state retailers and in-state retailers (or out-of-state wholesalers and in-state wholesalers) equal access to in-state markets for alcohol products. Indeed,

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[6] *See* Pet. 19 ("the *Granholm* Court . . . compar[ed] in-state and out-of-state *producers*).

[7] *See Granholm*, 544 U.S. at 489 ("We have previously recognized that the three-tier system itself is 'unquestionably legitimate.' *North Dakota* v. *United States*, 495 U.S. [423, 432 (1990)]. *See also id.* at 447 (SCALIA, J., concurring in judgment) ('The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler')." (omission in original)).

an inherent feature of these systems is that out-of-state retailers and out-of-state wholesalers have *no* access to in-state alcohol markets at all. If they want to sell or distribute alcohol in a particular State, they must become licensed retailers or wholesalers *within* that State's three-tier system. This deliberate and essential feature of three-tier systems ensures that States can effectively monitor and police the entities that sell alcohol within their borders, pursuant to their plenary authority under the Twenty-first Amendment to regulate the distribution of alcohol to their citizens.[8]

As the court of appeals correctly recognized, by affirming the constitutional validity of three-tier systems, this Court necessarily determined that the dormant Commerce Clause *permits* the differential treatment of in-state and out-of-state retailers (and in-state and out-of-state wholesalers) that is inherent in three-tier systems. If out-of-state retailers of alcohol were constitutionally entitled to the same sales and distribution privileges as in-state retailers of alcohol, as Petitioners argue, then three-tier systems would be unconstitutional and States would have to dismantle them – a proposition squarely rejected in *Granholm*.[9] Accordingly, the

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[8] In this regard, contrary to Petitioners' suggestion (Pet. 18-19), the court of appeals was quite correct to recognize that Petitioners' attempt to compare the activities of in-state retailers and out-of-state retailers "improperly compares unlike market functions." Pet. App. 19a. Since out-of-state retailers of alcohol are necessarily precluded from participating in in-state retail markets by constitutionally permissible three-tier systems, out-of-state retailers of alcohol and in-state retailers of alcohol necessarily "serve different markets" and, therefore, are not "similarly situated for constitutional purposes." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 299 (1997).

[9] As Justice Thomas correctly recognized in his dissent in *Granholm*, the majority could only strike down the Michigan and New York laws, and simultaneously endorse three-tier systems, by relying "on the difference between discrimination against manufacturers (and therefore, their products) and discrimination against wholesalers and retailers." 544 U.S. at 521.

court of appeals properly rejected Petitioners' fallback claim that the personal import exception violates the dormant Commerce Clause because it discriminates against out-of-state retailers of alcohol.

Once the constitutionality of the three-tier system is properly understood and acknowledged, it is clear that Petitioners' claim that the personal import exception violates the dormant Commerce Clause is baseless. The personal import exception is a very narrow exception to Virginia's general, and plainly permissible, ban on the importation of alcohol outside of its three-tier and control systems. That ban is necessary in order to maintain the integrity of those systems. Virginia must ensure that all alcohol that enters the Commonwealth passes through those systems. It therefore generally requires all wine and beer entering the Commonwealth to be delivered to Virginia-licensed wholesalers and all liquor entering the Commonwealth to be delivered to the ABC Board. This scheme, to be sure, generally requires out-of-state retailers to import wine into Virginia through the three-tier structure, *see* Pet. 11-12 n.5, but that requirement is necessary in order to ensure the integrity of the three-tier system itself.[10]

As the court of appeals appropriately concluded, the personal import *exception* to Virginia's import restrictions is an odd target for a dormant Commerce Clause challenge, particularly one brought by out-of-state retailers. That exception, and other exceptions in the import statute, presumably exist because it simply is not feasible for Virginia to monitor and police every drop of alcohol that crosses its borders. The Commonwealth therefore has established a limited number of reasonable, *de minimis* exceptions that

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[10] As Petitioners acknowledge, Pet. 12 n.5, out-of-state retailers can obtain licenses to make limited direct shipments of wine and beer to Virginia residents for personal consumption, on the same terms that in-state retailers can obtain these licenses. Va. Code Ann. § 4.1-112.1.

pose no threat to its overall distribution schemes. The personal import exception, for example, allows individuals to bring small quantities of alcohol into the Commonwealth for personal use (not resale). Another exception allows individuals moving into the Commonwealth to bring in "reasonable" quantities of alcohol for personal consumption in their personal and household effects. Va. Code Ann. § 4.1-310(E)(ii). Similarly, Virginia permits the possession and storage of alcohol on passenger boats and train cars. *Id.* § 4.1-310(E)(iii). In each of these situations, Virginia has little interest in establishing an inspection and enforcement system that could police these small instances of "importation" because these instances have little impact on their general distribution schemes.

The court of appeals rightly concluded that this truly "*de minimis*" exception to Virginia's wholly constitutional import restrictions simply cannot be viewed as "economic protectionism" under any "economic construct." Pet. App. 23a. Indeed, the exception accommodates the interests of Virginia residents and other individuals who want to purchase wine from out-of-state retailers and bring it into Virginia, and therefore benefits the out-of-state retailers themselves. That is, the exception in fact facilitates sales by out-of-state retailers that otherwise might not occur if Virginia categorically banned all imports outside of its three-tier system, which it constitutionally could do. Accordingly, the personal import exception provides no protection or advantage to Virginia retailers (or any other Virginia entities), and does not violate the dormant Commerce Clause.[11]

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[11] The fact that Virginia allows its residents "virtually unrestricted access to certain alcoholic beverages sold by Virginia retailers," Pet. i (Question Presented No. 1), does not present any issue of discrimination under the dormant Commerce Clause. As demonstrated, Virginia's restrictions on the importation of alcohol are wholly consistent with and preserve its constitutionally permissible three-tier and control systems. The alcohol sold by in-state retailers has already passed through those

B. The ABC Stores Provision Does Not Violate The Dormant Commerce Clause.

The court of appeals' conclusion that the ABC stores provision falls within the "market participant" exception to the dormant Commerce Clause because it permits Virginia to make a "choice" with respect to the wines sold by its state-run liquor stores that any of Virginia's thousands of wine retailers "would be free to make for itself," Pet. App. 27a, is a correct application of settled legal principles governing that exception.

There is no dispute here about what the "market participant" exception to the dormant Commerce Clause means or the principles that govern its application. As Petitioners acknowledge, it "allows a state to discriminate in favor of in-state interests when it is 'acting as a market participant, rather than as a market regulator.'" Pet. 23 (quoting *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 93 (1984) (plurality)); *see also* 467 U.S. at 93 (if the State is a valid market participant, "the dormant Commerce Clause places no limitation[s] on its activities").

The court of appeals' analysis of the ABC stores provision under these principles was straightforward and unassailable. It first concluded that Virginia acts as a "market participant" – an alcohol retailer that sells to the public – in operating its ABC stores. Pet. App. 26a (Virginia has "elected" to sell wine as well as liquor "from state-owned and operated stores"); *id.* (Virginia "competes as a participant in the Virginia wine market"). It then concluded that Virginia's decision to sell only Virginia wine in its ABC stores falls within the "market participant" exception because any private wine retailer would be free to do the same: "Like all other in-state wine retailers, the ABC stores can choose which wines

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systems, and Virginia's decision to provide consumers with "virtually unrestricted access" to it for personal consumption presents no issue under the dormant Commerce Clause.

they purchase and stock, and Virginia's commitment to purchase only in-state wines is a choice that any wine retailer would be free to make for itself." *Id.* at 26a-27a; *see also id.* at 30a ("[A] State may engage as a competitor in a free and open market, making business choices to buy and sell goods, even if those choices favor local products. And that is all that Virginia has done here . . . ."). The courts of appeals' conclusion that the "market participant" exception permits Virginia to sell what it wants in its own stores, even if it chooses to favor local products, is wholly consistent with this Court's jurisprudence. The essence of the exception is that States can favor local products when they act as market participants.

Petitioners do not dispute the court of appeals' conclusions that Virginia is participating in the Commonwealth's competitive wine market as a wine retailer and that its choice to sell only Virginia wine is a choice that any private wine retailer could make. Instead, Petitioners assert – as they did below, Pet. App. 29a-31a – that Virginia is "not a market participant in the relevant sense" because it has a monopoly on the distribution of liquor and "has leveraged that monopoly into a market advantage for Virginia wine producers." Pet. 23-24; *see also id.* at 24-25 (Virginia "has distorted the market by creating a regime in which consumers who want to purchase all of their alcoholic beverages at one time or in one place *must* purchase Virginia wine").

This "leverage"/"market distortion" theory makes little common sense. It rests on the notion that Virginia consumers purchase Virginia wine at ABC stores, rather than make a second trip to a private retail store to purchase out-of-state wine, because consumers prefer to purchase "all of their alcoholic beverages at one time or in one place." Pet. 24-25. But Virginia consumers cannot do that in any event. The ABC stores have no authority to sell beer, so "one-stop shopping" for alcoholic beverages simply is not available in

Virginia, and consumers who want to purchase liquor, wine and beer necessarily must visit more than one store anyway.

It therefore is not surprising that the court of appeals found no record support for the claim that Virginia conferred an advantage on its in-state wineries through the ABC stores provision. It found "no evidence in the record" that Virginia's policy "interferes with or burdens the free and competitive market in both in-state and out-of-state wines," "no evidence" that Virginia consumers "face any impediment to purchasing wines of their preference at fair market prices," and "no evidence" to support any claim that consumers who wish to purchase both liquor and wine are deterred from purchasing out-of-state wines by the inconvenience of having to go to a separate store. Pet. App. 30a.[12] The court of appeals' factual findings wholly undermine Petitioners' claim that "the benefit conferred on Virginia wines by this regime is manifest." Pet. 25. These factual findings do not warrant review by this Court.

At the end of the day, the court of appeals correctly concluded that the ABC stores provision does not raise any issue under the dormant Commerce Clause. It is indisputable that out-of-state wineries have abundant outlets for their products in Virginia: "as the plaintiffs concede, there are thousands of retail outlets at which consumers may purchase both out-of-state and Virginia-produced wines at fully competitive prices." Pet. App. 29a-30a; *id.* at 31a (consumers in Virginia can purchase wine "from over 10,000 private retailers throughout the Commonwealth"). In light of the pervasive availability of out-of-state wines in Virginia, the fact that Virginia consumers who happen to want to purchase both liquor and out-of-state wine at the same time must go to

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[12] The court of appeals also found "no evidence in the record" to support the dissent's related economic theory that the relevant market is the combined market for liquor *and* wine. Pet. App. 31a.

two separate stores simply does not raise a serious constitutional issue.[13]

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[13] Petitioners also argued below that the "market participant" exception could not apply as a matter of law because Virginia simultaneously regulates and participates in the market for wine. The court of appeals properly rejected that argument, Pet. App. 27a-29a, and Petitioners do not renew it here.